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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 457

WESTINGHOUSE ELECTRIC & MANUFACTURING
COMPANY,

Petitioner,

vs.

CROSLEY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIR-
CUIT AND SUPPORTING BRIEF.

VICTOR S. BEAM,

40 Wall Street,

New York City,

CARL S. LLOYD,

33 North LaSalle Street,

Chicago, Illinois,

W. MELVILLE VAN SCIVER,

Lester, Pennsylvania,

Attorneys for Petitioner.



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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIR-
CUT AND SUPPORTING BRIEF.**

*The Honorable Chief Justice and Associate Justices of the
Supreme Court of the United States:*

Your petitioner, Westinghouse Electric & Manufacturing Company, respectfully prays that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case July 31, 1942, reversing a judgment of the United States District Court for the Western District of Pennsylvania in favor of your petitioner. A petition for rehearing was denied by the Court of Appeals with an opinion thereon filed September 10, 1942.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 [43 Stat. 938, 28 U. S. C. Section 347 (a)].

Opinions Below.

The opinion of the Circuit Court of Appeals on the appeal is reported at 54 U. S. Patents Quarterly 291, and its opinion on the petition for rehearing at 54 U. S. P. Q. 470. The opinion of the District Court is reported at 52 U. S. P. Q. 428 and 43 Fed. Supp. 690.

Statement.

Petitioner, a Pennsylvania corporation, is a manufacturer of various products, including domestic refrigerators, and is the owner of a number of patents relating to such refrigerators. Respondent, an Ohio corporation, is an alleged infringer of certain of these patents.

On July 28, 1941, petitioner wrote a letter to respondent setting forth in detail the patents and claims thereof which it charged to be then infringed by respondent, the letter ending with the following statement:

"Since the Crosley Corporation has never made satisfactory endeavors to adjust any patent matters with us respecting domestic refrigerators, you are advised that we are about to file a suit or suits against you for infringement of all of the above-listed patents."

Petitioner immediately caused complaints for infringement of all said patents to be completed by counsel in Chicago and on July 30, 1941, they were forwarded to petitioner's office in New York, where they were received on July 31. On the same day they were forwarded by petitioner to local counsel in Cincinnati, where respondent's

principal place of business is located and where the alleged infringement had occurred, with definite instructions that they be immediately filed, which was done on the following day, August 1, 1941. Meantime respondent had received petitioner's letter in Cincinnati on July 30 and on the next day, July 31, caused the present action to be filed in Pittsburgh, service being obtained on petitioner on August 1.

When said complaints were forwarded from New York petitioner had no knowledge of the filing of the present action or of any intent by respondent to file such an action, and in fact the infringement suits in Cincinnati had probably already been filed before service of the summons in the present case, although the exact hour of filing is not a matter of record. No publicity had been given by petitioner to the alleged infringements and no notice thereof had been sent to respondent's customers or to the refrigerator trade.

A motion was filed by petitioner in the District Court in Pennsylvania to dismiss the declaratory action or, in the alternative, for a stay of proceedings therein pending disposition of the infringement suits in Ohio, and respondent moved for an injunction against prosecution by the petitioner of said infringement suits. The District Court denied respondent's motion for an injunction and ordered the case off the trial list pending disposition of the infringement suits, describing respondent's action as "unseemingly hasty to grab venue" and stating that such action called for disapproval. On respondent's appeal from the order denying the injunction the Court of Appeals reversed the order, holding that in view of the fact that the declaratory judgment suit was filed the day prior to the filing of the infringement suits, it was an abuse of discretion by the District Court not to enjoin the prosecution of the latter suits, the Court stating that it thought the reasons for the rule of priority, which was the sole ground of the decision,

were "just as valid when applied to the situation where one suit precedes the other by a day as they are in a case where a year intervenes between the suits."

The Question Presented.

The question involved is whether or not a suit under the Declaratory Judgment Act (Judicial Code, Sec. 274 d; U. S. C., Title 28, Sec. 400), if filed first, no matter by how narrow a margin of time or under what circumstances, should be given precedence over a corresponding patent infringement suit regardless of all considerations but priority of filing, particularly in view of the recent decision of this Court in the case of *Stonite Products Co. v. Melvin Lloyd Co.*, 315 U. S. 561, which is deemed to leave in doubt the right of a patent owner to counterclaim for infringement in a declaratory judgment suit brought under Section 51 of the Judicial Code (U. S. C. A., Title 28, Sec. 112).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The reasons for granting the writ are:

1. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court and contrary to a rule regularly followed in decisions of other Circuit Courts of Appeals.

The decision of the Circuit Court of Appeals is believed to be in conflict with such decisions of this Court as *Brillhart v. Excess Ins. Co. of America*, 62 S. Ct. 1173, and such decisions of other Circuit Courts of Appeals as *Aetna Casualty Co. v. Quarles*, 32 Fed. (2d) 321 (4th Circuit), and *American Automobile Insurance Co. v. Freundt*, 103 Fed. (2d) 613 (7th Circuit), holding that the exercise of jurisdiction under the Declaratory Judgment Act is not compulsory but is a matter resting within the sound discretion of the trial court.

2. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The question of whether or not mere priority of filing compels a district court to sustain a declaratory judgment suit as against a corresponding executory suit involving the same issues has not been decided by this Court and is highly important in the administration of the Declaratory Judgment Act. This question is squarely presented for the first time by the present case.

3. The Circuit Court of Appeals has failed to decide an important question of federal law which was presented in this case and which has not been, but should be, settled by this Court.

The question here referred to is whether, in view of the *Stonite* decision, holding that Section 48 of the Judicial Code exclusively controls venue in patent infringement proceedings and is entirely independent of Section 51, a patent owner against whom a declaratory judgment suit has been filed under Section 51, can counterclaim for infringement.

ARGUMENT.

The Decision of the Court of Appeals Leaves Practically No Discretion to the District Courts and Thus Is in Conflict With Decisions of This Court and of Other Circuit Courts of Appeals.

The District Court realistically appraised the respondent's hasty action in the present case as exactly what it was, namely, an attempt "to grab venue" and not a bona fide effort to obtain relief which it needed and could not otherwise get. The Court therefore used sound judgment in denying respondent the right to proceed in the suit which it had rushed into court merely to get ahead of the suits which it had been advised, and obviously believed, were about to be filed for infringement of all the patents here involved. To hold that this action by the District Court was an abuse of its discretion and that the only way that the Court could have properly exercised its discretion was to have held that the declaratory action should be given precedence merely because it was filed a day earlier than the infringement suits, is practically to deny to that Court all discretionary power. Discretion which can be exercised in only one way is no discretion at all. If the decision of the Court of Appeals is permitted to stand the district courts, at least those in the Third Circuit, will hereafter be bound to a rigid rule of priority and, for all practical purposes, will be without discretionary power to prevent abuses under the Declaratory Judgment Act which, if not controlled, may become as serious as those which the Act was intended to eliminate.

The Circuit Court of Appeals for the Third Circuit had been gradually approaching this position through its prior decisions in the cases of *The Crosley Corporation v. Hazel-*

tine Corporation, 122 F. (2d) 925, and *Triangle Conduit and Cable Co., Inc., v. National Electric Products Corp.*, 127 F. (2d) 524. In both of these cases petitions to this Court for writs of certiorari were presented and denied (see 315 U. S. 813 and 316 U. S.), but both cases were very different from this one and in neither of them was the rule of "mere priority" necessarily the basis of the decision.

In the *Hazeltine* case the declaratory action was not brought for more than a year after the notice of infringement which led to its being filed and in the meantime the patent owner had done certain things, including the filing of an infringement suit on only two of the twenty-two patents involved, strongly indicating harassment of the alleged infringer. Furthermore the infringement suits, the prosecution of which was enjoined (which suits involved only fifteen of the remaining twenty patents mentioned in the notice), were not started until seventeen days after, and quite obviously as a result of, the filing of the declaratory action. It was plain, therefore, that the latter action was a proper one under the circumstances and the holding of the Court of Appeals that, to avoid duplication, the trial court should have enjoined prosecution of the later infringement suits, was not necessarily in conflict with the rule that the exercise of jurisdiction in declaratory suits is a matter within the discretion of the trial court. The Court merely held that such discretion must be a legal discretion and must not be exercised arbitrarily.

In the other case (*Triangle v. National*) the ground of decision was the same, although on its facts the question was a somewhat closer one. The infringement suit, the prosecution of which was enjoined, was not filed until more than two weeks after the filing of the declaratory action and may well have been prompted by the latter. Furthermore customers of the alleged infringer had been notified

of the alleged infringement and one of them was joined in the infringement suit, so to some extent the element of harassment was involved.

But in the present case petitioner proceeded with the infringement suits immediately after sending the notice, and, with no knowledge whatever of respondent's action, forwarded the complaints to Cincinnati with instructions for immediate filing, the actual filing being on the same day that petitioner was served in respondent's action. There is nothing in the original decision of the Court of Appeals or in its decision on the petition for rehearing to indicate that anything but the one-day difference in filing of the actions in any way affected the result. Therefore the Court has now gone the whole way and, for the first time, has established as the actual ground of its decision the rule that if a declaratory action is filed prior to the executory action it must be given precedence, even though, as here, the trial court may, with the best of reasons, be satisfied that there was no proper occasion for the filing of the declaratory action and that it was filed only to "grab venue".

If the action of the District Court in the circumstances of this case was arbitrary and an abuse of discretion, as the Court of Appeals held, then apparently refusal of an injunction in the earlier-filed suit would be so in any case. We submit that a rule which leads to this result cannot be reconciled with the decisions above cited and others which definitely hold that the trial court has real discretionary power in cases of this character.

In the case of *Brillhart v. Excess Ins. Co. of America*, 62 S. Ct. 1173, which the Court of Appeals referred to in its opinion in the present case and sought to distinguish on the ground that in a case such as the one here involved "the delicate situation which may result from the conflict-

ing jurisdiction of state and federal courts cannot arise", this Court said:

"Although the District Court had jurisdiction of the suit under the Federal Declaratory Judgments Act, it was under no compulsion to exercise that jurisdiction. The petitioner's motion to dismiss the bill was addressed to the discretion of the court. * * * *"

And in a separate concurring opinion by one of the Justices it was stated:

"The exercise of jurisdiction under the Federal Declaratory Judgments Act is certainly not compulsory; it is discretionary. Borchard, *Declaratory Judgments* (2d ed.), p. 312. * * * *"

There is nothing in this decision to indicate that the rule stated is confined to cases of "conflicting jurisdiction of state and federal courts". It is stated as a general rule and appears clearly to apply to cases in which both suits are in federal courts as well as to those in which one is in a federal court and the other in a state court.

In the case of *Aetna Casualty & Surety Co. v. Quarles*, 92 F. (2d) 321, 324 (1937), the Circuit Court of Appeals for the Fourth Circuit said:

"* * * *The declaring of 'rights and other legal relations' without executory or coercive relief* is an extraordinary remedy, the granting of which, like the remedies mentioned, *should certainly rest in the sound discretion of the court because of the liability of abuse to which it might otherwise be subjected.*"

"* * * While the federal act does not expressly provide that the granting of declaratory relief shall rest in the court's discretion, this is clearly implied from the fact that it merely gives the court power to grant the remedy without prescribing any of the conditions under which it is to be granted, and it is hardly to be supposed that it was intended that it should be granted as of course in every case where a controversy exists. * * * *And in every case in which the ques-*

tion has been raised the holding has been that the granting of relief under the federal act is a matter resting in the sound discretion of the court." (Emphasis here and elsewhere herein ours.)

In the case of *American Automobile Ins. Co. v. Freundt*, 103 F. (2d) 613 (1939), the Circuit Court of Appeals for the Seventh Circuit stated the same rule, with full citation of authorities, and at page 617 made the following pertinent comment:

"* * * The roots of declaratory procedure are found in equity procedure, chiefly in the *quia timet* relief. *The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.* * * *

Another comment which is particularly pertinent to the present case is to be found in Professor Borchard's work on Declaratory Judgments, 2nd Ed., p. 303, as follows:

"* * * and where a party's action is about to begin or has begun, it serves no sensible end to permit his adversary to appear as equitable actor and start the proceedings for an autonomous declaration that he has a good defense to his opponent's pending or imminent action."

It is thus clear that the decisions of this Court and of other Circuit Courts of Appeals definitely establish the rule that a large measure of discretion is vested in the trial court in cases of this character, and it is submitted that the decision of the Third Circuit Court of Appeals in the instant case is directly contrary to these decisions.

Only one further matter remains to be considered on this phase of the opinion of the Court of Appeals, and that is its finding that the action of the District Court in merely ordering the case off the trial list instead of dismissing it was an exercise of that Court's discretion in favor of retaining jurisdiction to grant declaratory relief. There is

nothing at all in the opinion of the District Court which supports this finding, and surely a reading of the opinion can leave no doubt that the action of the respondent was thoroughly disapproved by that Court and that its order was intended as a refusal to exercise jurisdiction in the present case pending disposition of the infringement suits in Ohio. This finding of the Court of Appeals in no way alters the fact that its opinion does in actual effect deny to the District Court any real discretionary power in a situation such as the one here presented.

The Arbitrary Priority Rule Now Finally Adopted by the Third Circuit Court of Appeals Not Only Sanctions Unseemly Maneuvers Such as That of the Respondent in the Present Case But Would Likely Lead to Serious Abuses and Much Unnecessary Litigation.

If merely by filing his suit first an alleged infringer can gain the actual or supposed advantage of selecting a jurisdiction and of delaying and otherwise impeding the patent owner, it is likely that declaratory judgment suits will often be filed immediately upon receipt of a notice of infringement without any effort in advance to negotiate a settlement. Also, patent owners, faced with this prospect, would probably in many instances file suit without first attempting to negotiate with a supposed infringer, and perhaps without even giving him advance notice of the charge of infringement. Thus much unnecessary litigation, with consequent added burden upon the federal courts, would be likely to ensue from the rule which the decision of the Court of Appeals would establish.

The opportunities for the infringer to determine, within rather wide limits, the venue of a declaratory action under Section 51 of the Judicial Code, so far as corporate patent owners are concerned, are indicated by the decision of this Court in *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165,

an action under Section 51, in which the Court held that the designation in any state by a foreign corporation of an agent for the service of process is a consent to be sued in the courts of that state, federal as well as state. Since, as is well known, it is the general custom for corporations doing a national business to designate such agents in many states, declaratory actions could be brought against many corporate patent owners in any one of a large number of districts, some of which might be very remote and inconvenient.

Under Section 48 of the Code (U. S. C. A., Title 28, Sec. 109) a patent owner has the right to sue for infringement in the district of which the alleged infringer is an inhabitant or in which he has a regular place of business and has committed acts of infringement. Proof of infringement and execution of the decree can best be had in such a district. This important right should not be taken away and the corporate owner should not be compelled to litigate questions regarding its patents in any district in which the alleged infringer can obtain jurisdiction under Section 51 unless its conduct has been such as to give the alleged infringer proper grounds for a declaratory action. In other words, the alleged infringer's rights under Section 51 should not prevail over the patent owner's rights under Section 48 without cause and without fault on the part of the patent owner.

To allow the alleged infringer the advantages of choosing the forum and becoming the moving party or "equitable actor", merely because of his greater speed in suing, would greatly increase the use of the Declaratory Judgment Act as "an instrument of procedural fencing", as it has been used by the respondent in the present case. It is therefore a matter of importance that the use of the Act be confined to the beneficial purposes for which it was intended.

The Decision of the Court of Appeals Is Especially Prejudicial to Patent Owners Because of Doubt as to Whether, in View of the *Stonite* Case, a Counterclaim for Infringement Can Be Maintained in a Declaratory Action.

In the *Stonite v. Lloyd* case, *supra*, this Court said:

"We hold that Section 48 is the exclusive provision controlling venue in patent infringement proceedings.

"The Act of 1897 [Sec. 48] was adopted to define the exact jurisdiction of the federal courts in actions to enforce patent rights, and thus eliminate the uncertainty produced by the conflicting decisions on the applicability of the Act of 1887, as amended to such litigation. That purpose indicates that Congress did not intend the Act of 1897 to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings.

" * * * Section 51 is, of course, not applicable to patent infringement proceedings. *General Electric Co. v. Marvel Co.*, *supra*. * * *

This language, particularly when coupled with a reference in the opinion to the fact that "Section 48 is wholly independent of Section 51", indicates that a patent owner might not be permitted to sue for infringement by way of a counterclaim in a declaratory action brought under Section 51. He therefore might be forced to conduct two successive suits in different circuits involving the same parties and the same subject matter, with consequent long delay and other handicaps in obtaining adjudication of his claim.

As an instance of how the language of the *Stonite* case may be construed, the Court's attention is respectfully called to the holding of Judge Abruzzo in an unreported decision handed down July 7, 1942, in a patent infringement suit entitled *Bulldog Electric Products Co. v. Cole*

Electric Products Co., Inc. and Westinghouse Electric & Manufacturing Co. in the United States District Court for the Eastern District of New York. Westinghouse, which was not an inhabitant of that District but had filed an express designation of the Secretary of State as the corporation's agent for service of process within the State of New York, moved to quash the service of summons. It was argued for the plaintiff that the designation of such an agent waived the provisions of Section 48 so far as Westinghouse was concerned. However, Judge Abruzzo granted the motion and held as follows:

"Section 48 only applies and not Section 52 as argued by the Plaintiff. *Stonite Products Co. v. Melvin Lloyd*, March 9, 1942, unreported of the U. S. Supreme Court."

The Court of Appeals did not pass upon the question of petitioner's right to counterclaim for infringement in the present action although its attention was called to the *Stonite* case in the petition for rehearing, and it is submitted that the doubt which exists on this point is a further reason for granting the review herein requested.

WHEREFORE petitioner respectfully prays that this petition for a writ of certiorari be granted, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court below be reversed; and that petitioner be granted such other and further relief as may be just and proper.

VICTOR S. BEAM,
CARL S. LLOYD,
W. MELVILLE VAN SCIVER,
Attorneys for Petitioner.

October 9, 1942.

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Supreme Court of New Jersey

October Term, 1942

No. 497

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY,

Plaintiff

The General Corporation,

Defendant

MEMORANDUM OF ATTORNEY FOR PLAINTIFF

ATLANTIC CITY, N.J.

Floyd R. Gandy

Attn:

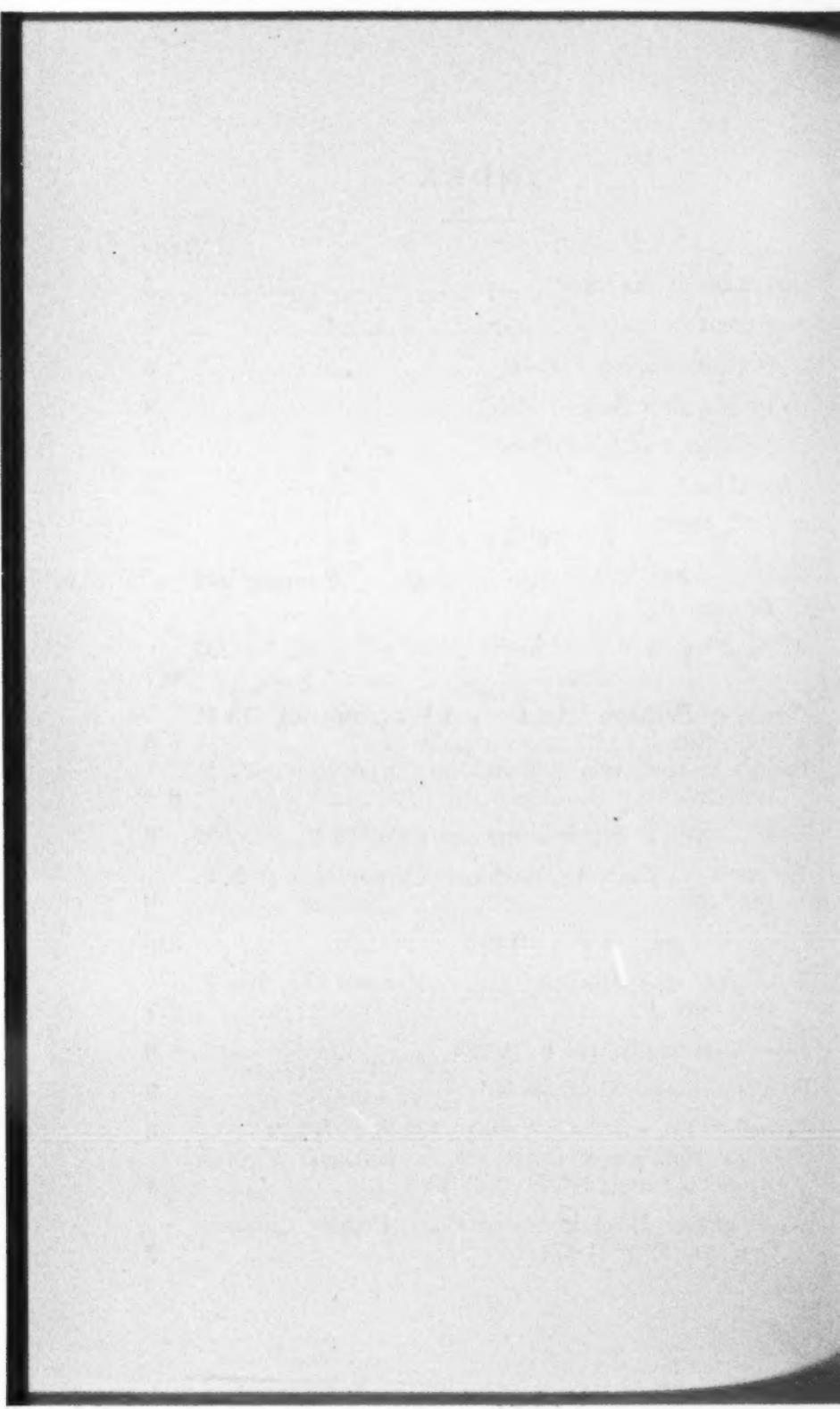


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IN THE
Supreme Court of the United States
October Term, 1942

No. 457

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY,

Petitioner,

vs.

THE CROSLEY CORPORATION,

Respondent.

**MEMORANDUM OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI.**

The petition in this case presents no ground warranting its grant.

The only question involved is whether or not one, who for a period of years has been charged with infringement of patent rights, and, because the patent owner took no action to justify the charge, brought a suit for a declaratory judgment of invalidity and non-infringement, is entitled to enjoin the prosecution of a patent suit in a different jurisdiction *subsequently* brought against him by the patent owner until adjudication is had in the suit first filed.

There is no diversity of opinion between Circuit Courts of Appeals on this single, simple question. To the con-

trary, there is unanimity of opinion by the three Circuit Courts of Appeals that have considered the matter.¹

Additionally, this Court, presumably for that reason, last term twice refused a writ of certiorari to review the question (*Hazeltine Corporation v. Crosley Corporation*, No. 892, October Term, 1941, 86 L. Ed. Advance Sheets 658; rehearing denied 86 L. Ed. Advance Sheets 813; *National Electric Products Corporation v. Triangle Conduit & Cable Company, Inc.*, 86 L. Ed. Advance Sheets 939).

The present petition is glaringly inaccurate in the statement of the material facts of the case in that it conveniently omits all reference to everything of record that transpired between the parties prior to July 28, 1941. For this reason it is believed that a restatement of the material facts is necessary.

Statement of the Case.

1. Petitioner, Westinghouse Electric & Manufacturing Company (hereinafter referred to as Westinghouse) is a Pennsylvania corporation, and is the owner of the patent rights here involved.
2. Respondent, The Crosley Corporation (hereinafter referred to as Crosley) is an Ohio corporation, engaged, *inter alia*, in the manufacture and sale of refrigerators.
3. Beginning on February 8, 1934, and periodically for seven years thereafter, Westinghouse sent Crosley repeated

¹ Third Circuit—The present case, viz.: *Westinghouse Electric & Mfg. Company v. Crosley Corporation*, 130 F. (2d) 474; rehearing denied, 130 F. (2d) 474; *Crosley Corporation v. Hazeltine Corporation*, 122 F. (2d) 925; *Triangle Conduit & Cable Company, Inc. v. National Electric Products Corporation*, 125 F. (2d) 1008. Sixth Circuit—*E. W. Bliss Co. v. Cold Metal Process Co.*, 102 F. (2d) 105. Seventh Circuit—*Milwaukee Gas Specialty Co. v. Mercoid Co.*, 104 F. (2d) 589.

notices of infringement of refrigerator patents assertedly owned by Westinghouse, expressly and impliedly threatening infringement suit thereon.²

4. On July 31, 1941 the last of these "notices" and threats of suit was sent Crosley by Westinghouse.³

5. Because Westinghouse, throughout this seven year period, had taken no action to attempt to make good its charge, or to justify its repeated threats, and because Crosley's patience had become exhausted by such repetitious harassment and attempted intimidation, Crosley filed the present action for declaratory judgment on the validity and infringement of all sixteen of the patents as to which it had last been threatened.⁴

6. One day thereafter Westinghouse filed complaints in three separate suits against Crosley in the United States District Court for the Southern District of Ohio, Western Division, for alleged infringement of these same patents.⁵

7. Crosley thereupon presented a motion in the present case for an injunction to restrain Westinghouse from prosecuting the subsequently filed patent infringement suits in Ohio until after an adjudication had been secured in the present case which was first instituted.

8. The Court of Appeals granted the injunction for the reasons stated in its opinion, and under principles considered at length in the prior decisions of that Court as well

² R. 14a, 15a, 17a, 19a, 20a.

³ R. 21a.

⁴ R. 3a.

⁵ One patent in the Ohio suits is the *reissue* of the *original* patent in the Pennsylvania suit. Of course, the reissue patent will ultimately be substituted for the original in the latter case.

as in the prior decisions of the Sixth and Seventh Circuit Courts of Appeals cited in the footnote on page 2 hereof.

Argument.

On the foregoing *complete* statement of the case it is believed that no extensive argument is necessary to show the utter want of merit in the present petition, as well as the absence of any ground which would warrant its grant.

On the bare merits of the matter it would be difficult, and certainly unnecessary, to add to the opinions of the Court of Appeals below in the present case and in *Crosley v. Hazeltine*, 122 F. (2d) 925, and *Triangle Conduit & Cable Co. v. National Electric Products*, 125 F. (2d) 1008, in all of which the same question was considered and passed upon.

In the light of the fact that Westinghouse, for seven years had been crying "wolf" with respect to its patent rights, its argument in support of its present petition boils down to the assertion that this time there *was* a wolf—it *did* intend to file a suit—a fact which Crosley had no way of knowing, but had had seven years of experience to induce it to disbelieve.

One would infer from petitioner's "Statement" (pp. 2-3) that petitioner sent the last notice of infringement on July 28, 1941 as a mere matter of form, and "immediately caused complaints for infringement" to be prepared by counsel for immediate filing. Such an inference likewise evades the record. The affidavit of petitioner's attorney, William A. Steiger, states (R. 29a):

"Therefore, it was decided to send a peremptory notice of infringement to Crosley bringing the infringement up to date and to file infringement suits

against Crosley if no immediate reply to said peremptory notice of infringement was received." (Emphasis ours.)

From this can be obtained the strong suspicion, if not the outright suggestion, that the unusual action of Westinghouse in filing the patent infringement suits in Ohio was induced by the institution of the present suit for declaratory judgment—if any consideration of this sort is material to the question here presented, and we assert it is not.

The use of patent rights, such as here has been indulged in by Westinghouse, long ago was judicially characterized as a "racket"; and the beneficial use of the Declaratory Judgment Act in curing that "racket" has been judicially recognized (*Lances v. Letz*, 115 F. (2d) 916, 917).

Consequently, in the light of all of the facts, only brief comment is believed to be necessary to show the want of merit in any of the three points of argument Westinghouse advances in support of the petition.

I.

It is asserted by the petition that the Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court as well as with decisions of other Circuit Courts of Appeals. This is not so. As has already been pointed out (*ante*, p. 2), there is complete unanimity of opinion in the Circuit Courts of Appeals that have passed on the question presented.

Next, the petition argues that the decision of the Court of Appeals leaves no discretion to the District Court in declaratory judgment actions. This will be recognized by this Court as the identical contention that was presented by the petitioner in *National Electric Products Corp. v. Triangle Conduit & Cable Co., Inc.*, No. 1078, October Term,

1941, in which certiorari was denied. Additionally, we point out that this contention was specifically considered and passed upon by the Court of Appeals in the present case, as the petitioner is reluctantly forced to admit (Petition pp. 10-11).

The District Courts still have discretionary power to determine whether or not there is an actual controversy so that their jurisdictions are properly invoked; they still have discretion to determine whether declaratory relief is proper. In patent cases, however, the Courts have been unanimous in holding that where, as here, a patent owner charges infringement by a manufacturer an actual controversy involving the validity and infringement of patent rights exists under the statute, and they unanimously have held that the failure or refusal of a District Court to recognize that fact constitutes a reversible abuse of discretion.⁶ The reason for this is quite obvious. Whenever patent rights are asserted there is a strong public interest involved.⁷ The public interest demands a speedy adjudication of the validity of a patent monopoly sought to be asserted. The use of a patent by a patent owner merely as a means of threat, intimidation and harassment, coupled with the failure to submit the patent to judicial adjudication as to its validity, is impelling reason—from the public viewpoint—for affording the one who has been threatened, intimidated and harassed the right to such adjudication.

⁶ *Creamery Package Mfg. Co. v. Cherry-Burrell*, 115 F. (2d) 980, C. C. A. 3; *E. Edelmann v. Triple-A Specialty Co.*, 88 F. (2d) 852, C. C. A. 7; *Lances v. Letz*, 115 F. (2d) 916, C. C. A. 2; *Hofmann v. Knitting Machines Corp.*, 123 F. (2d) 458, C. C. A. 3; *Treemond Co. v. Schering Corp.*, 122 F. (2d) 702, C. C. A. 3; *E. W. Bliss Co. v. Cold Metal Process Co.*, 102 F. (2d) 105, C. C. A. 6.

⁷ *Pope v. Gormully*, 144 U. S. 224, 234.

The Declaratory Judgment Act for the first time accorded a manufacturer that right by a suit against the patent owner in the jurisdiction of the domicile of the patent owner. The exercise of that right in the present case by Crosley—after seven years of harassment and attempted intimidation—is now characterized by petitioner as a “hasty action” constituting “an attempt to ‘grab venue’”, both of which characterizations, in the light of the facts, are absurd.

Petitioner professes to find a conflict between decisions in this Court and in the lower courts in insurance cases and the decision in this patent case. The Courts below found no such conflict. The Court of Appeals in the present case had this asserted conflict squarely before it, and found otherwise. The Seventh Circuit Court of Appeals, with which conflict is alleged by petitioner on the basis of that Court’s decision in the case of *American Automobile Insurance Co. v. Freundt*, 103 F. (2d) 613, certainly found no conflict, for it decided the *American Automobile* case one day prior to its decision of the case of *Milwaukee Gas Specialty Co. v. Mercoid Corp.*, 104 F. (2d) 589, which is expressly in accord with the decision below in the present case.

Again, the Court of Appeals for the Sixth Circuit certainly found no conflict, for in its opinion in the patent case of *E. W. Bliss Co. v. Cold Metal Process Co.*, 102 F. (2d) 105, it expressly considered some of the insurance cases here relied upon by petitioner to show conflict.

That patent cases involve different considerations from insurance cases is clear from a simple recognition of the fact that insurance cases involve strictly private issues between the litigants, while patent cases involve the validity of a patent grant, which, if held valid, operates against every individual within the realm.

II.

Petitioner also asserts that by being compelled to submit to an adjudication of the validity of its patents in the jurisdiction of its domicile, an alleged infringer not only gains the advantage of "selecting" a jurisdiction, but also "of delaying and otherwise impeding the patent owner". This, too, is absurd. Rule 57 of the Rules of Civil Procedure expressly provides:

"The Court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar."

This language spells speed—not delay. Petitioner does not state—nor can it—how the prospect of "impeding" a patent owner is greater in the jurisdiction of its domicile than in some foreign jurisdiction.

The patent owner may select any jurisdiction in which either of the exclusive rights to make, to use, or to sell has been violated. As is well known, this fact has been used in the past to further the so-called patent "racket", such as by subjecting a manufacturer to the necessity of protecting a large number of his customers scattered throughout the many federal judicial jurisdictions of the United States. As opposed to this, one seeking to cure the "racket" by a declaratory judgment suit, has but one jurisdiction in which to file the suit—the domicile of the patent owner.

Truly, the present petition has warped this situation beyond recognition.

III.

The petition finally expresses a doubt as to whether or not, in view of the decision of this Court in *Stonite v. Lloyd*, 315 U. S. 561, a counterclaim for infringement can be maintained in a declaratory judgment action. This doubt resides solely in the mind of Westinghouse, and, apparently, was created for the purpose of this petition. A mere reading of Rule 13(a) of the Rules of Civil Procedure, and a re-reading of this Court's decision in the *Stonite* case, will remove that doubt even from the mind of Westinghouse.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Respondent.

FLOYD H. CREWS,
ALDEN D. REDFIELD,
Of Counsel.

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IN THE

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Supreme Court of the United States

CLERK

OCTOBER TERM, 1942.

No. 457.

WESTINGHOUSE ELECTRIC & MANUFACTURING
COMPANY,

Petitioner,

vs.

THE CROSLEY CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONER.

VICTOR S. BEAM,
40 Wall Street,
New York City,

CARL S. LLOYD,
33 North La Salle Street,
Chicago, Illinois,

W. MELVILLE VAN SCIVER,
Lester, Pennsylvania.

Attorneys for Petitioner.

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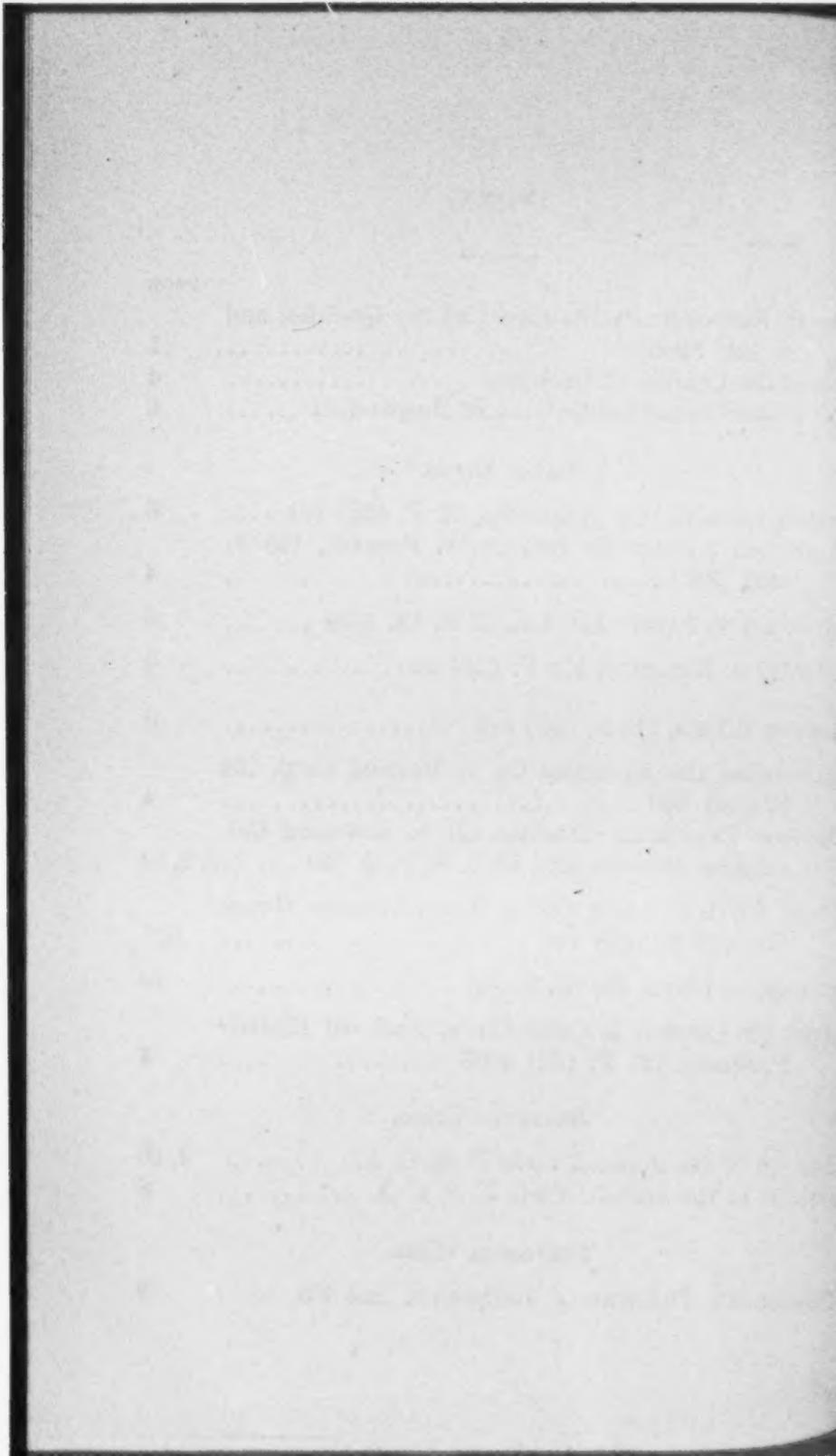
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REPLY BRIEF FOR PETITIONER.

**As to Respondent's Statement of the Question and
of the Facts.**

Respondent's statement of the question involved is exceedingly misleading and not at all in accord with the true situation. The present suit was not brought "because the patent owner took no action to justify the charge" of infringement, or because respondent was afraid petitioner would not bring suit, but, on the contrary, because respondent felt sure petitioner was about to sue and hence acted to "grab venue". No other conclusion is possible from a realistic view of the facts. Why else would the suit have been filed in Pittsburgh by New

York attorneys the very next day after receipt in Cincinnati of petitioner's letter of July 28, 1941!

The reference in respondent's statement of the question and in its statement of the case to certain communications between the parties about patent infringement matters prior to petitioner's letter to respondent above mentioned, is intended to give the impression that this was the cause of the filing of the instant action, but it is evident from the record that the previous correspondence had nothing to do with the matter. The contention that it did is a mere pretense.

The correspondence consisted of certain letters written back in 1936 and prior thereto and one on February 2, 1940, calling the attention of respondent to certain of petitioner's refrigerator patents which it believed to be infringed and offering respondent licenses thereunder (Crosley R. 25a-29a). Respondent ceased the alleged infringement of six of the patents referred to in the earlier correspondence and became licensed (indirectly) under one of them (C. R. 25a). Infringement of three of them continued, however, notwithstanding Crosley's changes of refrigerator models from time to time, and the letter sent in February, 1940, called attention to two additional patents which had just been issued. Thereafter, on September 1, 1940, respondent invited an offer of terms of license under all the patents then in question and, after considering an offer which was submitted by petitioner, advised petitioner on October 23, 1940, that it "had no present intention of acquiring licenses under the Westinghouse patents in question" but suggested that "a conference on the subject would be beneficial to both sides" (C. R. 27a, 28a). Petitioner expressed itself as agreeable to a discussion and on October 29, 1940, its representative wrote to the representative of respondent that "if you will suggest a time and place for a meeting, I will advise you if it is satisfactory". Nothing further

was heard from respondent and petitioner, becoming convinced that respondent did not intend to carry the negotiations further, wrote the letter of July 28, 1941 (C. R. 29a), advising respondent definitely and for the first time that suit for infringement would be brought.

It is thus evident that respondent's statement that this suit was filed "because Crosley's patience had become exhausted by such repetitious harassment and attempted intimidation" is utterly without foundation. There was no harassment or intimidation of any kind but only a businesslike correspondence confined to the parties themselves, with a long overdue response awaited from respondent when the latter was notified that immediate action for infringement of all the patents involved (including several which had issued since the letter of February 2, 1940) would be filed. Obviously it was only this notice that had anything to do with the filing of the declaratory suit and the speed in filing it shows beyond question that it was motivated only by respondent's knowledge of the imminent infringement action.

A review of the prior correspondence was therefore properly omitted from petitioner's statement of the case as being immaterial to the issue. Respondent's representations regarding it are merely for the purpose of attempting to create, as a justification for its groundless action, a case of harassment which did not exist.

The intimation on pages 4 and 5 of respondent's brief that petitioner may have been induced to file the infringement suits in Cincinnati by the institution of the present action in Pittsburgh is completely negated by the facts. The complaints were forwarded to Cincinnati on July 31, 1941, with Mr. Beam's letter (Westinghouse R. 6a) giving instructions for immediate filing, petitioner at the time having no knowledge of the present action and not being served therein until the following day, August 1, on which day the instructions contained in said letter of

July 31 were carried out by the filing of the infringement suits (W. R. 1a, 2a and 4a). Thus it is impossible that such filing could have been induced by respondent's action, but, on the contrary, it is perfectly clear that respondent was induced to file its action by its certainty that petitioner was about to sue.

Respondent's assertion that the present case is the same in its material facts as *Crosley v. Hazeltine*, 122 F. (2d) 925, and *Triangle Conduit & Cable Co. v. National Electric Products*, 125 F. (2d) 1008, in which writs of certiorari were denied by this Court, is also incorrect. Those cases did not, on their facts, present the question of whether mere priority of filing is to be substituted for the discretion of the trial court in determining whether a declaratory action is to be given precedence over a corresponding executory action, such as a patent infringement suit. The factual distinctions are believed to be sufficiently stated in the brief in support of the petition to show that this is so.

As to the Conflict of Decisions.

Respondent seeks to show that the decision of the Court of Appeals below does not conflict with the decisions of other Courts of Appeals and of this Court. Its effort completely fails.

It is contended that the very pertinent comments of the Seventh Circuit Court of Appeals in *American Automobile Ins. Co. v. Freundt*, 103 F. (2d) 613, are not to be taken as indicating conflict because of a decision of the same court the following day in *Milwaukee Gas Specialty Co. v. Mercoid Corp.*, 104 F. (2d) 589, in which it was held that, in the circumstances of that case, an earlier-filed declaratory judgment suit should prevail over a later infringement suit. That the Court meant what it said in the *Freundt* case and that there is real conflict

between the principles of its decisions and those on which the present case was decided by the Third Circuit Court is shown by the recent case of *Penn Electric Switch Co. v. United States Gauge Co.*, 129 F. (2d) 166, in which the Seventh Circuit Court, in holding that a declaratory action was not barred by an earlier-filed infringement suit on the same patent against one of plaintiff's customers in another jurisdiction, said:

" * * * In the instant suit the parties were not the same. * * *

"Moreover, there was no jurisdictional obstacle to the bringing, or to the maintenance of a suit for a declaratory decree * * * based on the pendency of a patent suit, on the same patent and claim, between the same parties, in another court having jurisdiction of the infringement suit and of the parties. The granting of a declaratory judgment lies in the sound discretion of the trial judge.

"In such a situation one court may, if the facts warrant it, stay the other suit by ordering the parties before it to take no further steps in the second suit. *Such motion to stay, however, is addressed to the court's discretion, not to its jurisdiction. The soundness of the exercise of its discretion may, no doubt, also be reviewed, but only as a question of the proper exercise of judicial discretion, may it be reviewed.*

"Disposition of a motion addressed to the court's discretion depends solely upon the facts in each case. A long delayed suit for alleged infringements of an alleged valid patent, after a somewhat extensive attack on customers,—a sort of a guerilla warfare,—does not appeal to a court of equity, even though the infringement suit was brought before the declaratory judgment suit was begun." (Emphasis ours.)

This clearly shows that in the Seventh Circuit mere priority of filing is not controlling and the instant decision

is thus definitely in conflict with the decisions of the Court of Appeals of that Circuit, as well as with the decision of the Fourth Circuit Court of Appeals in *Aetna Casualty Co. v. Quarles*, 92 F. (2d) 321, and the decision of this Court in *Brillhart v. Excess Ins. Co.*, 62 S. Ct. 1173, cited in the brief in support of the petition.

The only effort of respondent to show that there is no conflict between the latter two decisions and the decision of the Court of Appeals here is the statement on page 7 of its brief that insurance cases "involve strictly private issues" while patent cases involve the public interest. While it is not conceded that the procedure in insurance cases is not also a matter of public interest, it should suffice to point out in answer to this contention that in none of the cases cited, nor in any others so far as petitioner is aware, is any distinction in principle made between insurance cases and patent cases, and that in the above quoted decision of the Seventh Circuit Court the same principles are applied to a patent case as have been applied in insurance cases.

It is true, as respondent asserts, that patent cases do involve the public interest and that is one reason why the writ should be granted in the present case in order to correct an erroneous decision of far-reaching effect in patent litigation.

As to Additional Contentions of Respondent.

Another contention made by respondent, and in support of which it cites a group of cases in the footnote on page 6 of its brief, is that where "a patent owner charges infringement by a manufacturer an actual controversy *** exists" and that the courts have unanimously held "that failure to recognize that fact constitutes a reversible

abuse of discretion". This is also beside the point here since there is no issue as to whether there was a "controversy" within the meaning of that term as used in the statute but only as to whether the trial court is free to use its discretion in determining whether under the circumstances of particular cases a declaratory action should be given precedence over an executory action.

Respondent, in attempting to answer petitioner's contention that one of the evils of substituting a "rule of priority" for the "rule of discretion" is that under the former an alleged infringer can harass a corporate patent owner by suing it in a remote jurisdiction of the infringer's choosing, states categorically that one who wishes to bring a declaratory judgment suit "has but one jurisdiction in which to file the suit—the domicile of the patent owner". That this is not true is shown by the above cited decision in *Penn Electric Switch Co. v. U. S. Gauge Co.*, in which the court held that the fact that the defendant, a Pennsylvania corporation, was licensed to do business in Illinois rendered it subject to jurisdiction of the federal courts in that State, and also by the recent case of *Monroe Calculating Machine Co. v. Merchant Calculating Machine Co.*, 55 U. S. P. Q. 189, in which Judge Kirkpatrick in the Eastern District of Pennsylvania held that a patent owner, although domiciled in California, was subject to a declaratory action in Pennsylvania solely because it had appointed the Secretary of State in that State as an agent for purposes of service. This clearly demonstrates how a corporate patent owner, *without fault on its part*, can be deprived of his rights in patent cases under Section 48 of the Judicial Code and subjected to an action in a foreign jurisdiction under Section 51, if the priority rule establish by the Third Circuit Court of Appeals is to stand.

The *Monroe* case also strikingly substantiates petitioner's contention that under the Third Circuit rule the district courts in that Circuit must feel that they are deprived of all discretion in the matter of entertaining a declaratory judgment suit if filed ahead of a corresponding infringement suit. The court found as a fact that:

" * * * defendant was induced to withhold suit for infringement by a belief, reasonably based upon statements and letters of the plaintiff's attorney, that all litigation by either party would be held in abeyance until a definite answer was received from the plaintiff's attorney as to the position which it would take in respect to the charge of infringement. With matters in this shape the plaintiff, without advance notice to the defendant, brought this action. The defendant followed with an infringement suit in California * * *."

Nevertheless Judge Kirkpatrick felt bound to issue an injunction restraining the prosecution of a later-filed infringement suit in California, stating:

"The preliminary injunction will be granted. The law upon this point was fully declared by the Circuit Court of Appeals of the Third Circuit in *Crosley v. Hazeltine*, 122 F. 2d 925 [51 U. S. P. Q. 1]; *Triangle v. National Electric*, 125 F. 2d 1008 [51 U. S. P. Q. 425]; and *Crosley v. Westinghouse* [54 U. S. P. Q. 291]. * * *"

Respondent, with no justification whatever, characterizes the orderly procedure of the petitioner in the exercise of its patent rights as a "racket" and refers to the case of *Lances v. Letz*, 115 F. (2d) 916 (C. C. A. 2). Examination of that decision shows that the case was in no sense comparable to the present situation, particularly since the declaratory action was not brought until nine

months after a definite threat of an infringement and there was nothing to indicate that the patent owner was going to sue—in fact the indications were clearly that he was not willing to submit the charge for adjudication. The Court merely stated in a general discussion of the purposes of the Act, which had been very properly invoked in the circumstances of that case, that one of the situations in which the declaratory judgment is most helpful is that of patent litigation where a threat of infringement has been made and not pressed, the point being illustrated by quoting the following statement from Borchard on Declaratory Judgments: "This has had a most beneficial effect in curing what had become a racket. For patentees, none too sure of the validity of their patents, had often notified customers or licensees of their rivals or competitors of their intention to bring suit against all who dealt in the product in question." Doubtless respondent's only reason for reference to the case was the use of the word "racket" in the Borchard quotation, which was applied by the author to a wholly different situation. It may well be applied to such conduct as the respondent's misuse of the Declaratory Judgment Act by racing into a jurisdiction of its own choosing in order to get its action on file before the imminent infringement action could be filed in the district of its domicile, but it has no application to any actions of the petitioner.

Notwithstanding Rule 57 of the Rules of Civil Procedure, referred to on page 8 of respondent's brief, the Declaratory Judgment Act can be used under the decision of the Court of Appeals as an instrument of delay and obstruction, as well as an instrument of procedural fencing, particularly if a corporate patent owner of California can be sued for a declaratory judgment in Pennsylvania by a Delaware corporation having its place

of business in New Jersey, as in the *Monroe v. Merchant Calculating Machine Co.* case, *supra*, and then compelled to sue the alleged infringer for infringement, in a jurisdiction permitted by Section 48, Judicial Code, as it may well find it necessary to do under the *Stonite v. Lloyd* case, 315 U. S. 561, for the reasons mentioned in petitioner's main brief. Respondent has made no effort to deal with the implications of the latter decision or to answer on its merits petitioner's point in respect thereto.

Respectfully submitted,

VICTOR S. BEAM,
CARL S. LLOYD,
W. MELVILLE VAN SCIVER,
Attorneys for Petitioner.

